



MALTA

**Administrative Review Tribunal
(Value Added Tax Act - Chapter 406 of the Laws of Malta)
Magistrate
Dr. Gabriella Vella B.A., LL.D.**

Application No. 51/16VG

XXX

Vs

Commissioner for Value Added Tax

Today, 13th April 2021

The Tribunal,

After having considered the Application filed by XXX on the 25th July 2016, by means of which he requests that the Tribunal declare the Demand Note issued by the Commissioner for Value Added Tax on 6th July 2016 null and void on the grounds that: (i) the said Demand Note has been erroneously issued against the company Alexandr Limited, which is in the process of being liquidated; (ii) the assessments, including the final assessments, issued by the Commissioner for Value Added Tax have not been duly served on the Liquidator of the Company or on the Applicant as required by law, thus leading to the violation of the taxpayer's rights since the assessments could not be duly contested; and that (iii) the assessments and the Demand Note are exaggerated and do not reflect the actual business as carried out by the taxpayer;

After having considered the Reply by the Commissioner for Revenue by means of which he objects to the appeal lodged by the Applicant and requests that the same be rejected, whilst the assessments and subsequent Demand Note be confirmed, on the basis of the following pleas: preliminarily that - (i) the Administrative Review Tribunal is not the competent forum to determine and decide the grievances put forth by the Applicant with regards to the Demand Note dated 6th July 2016; (ii) the appeal by the Applicant is null and void since it was not filed within the statutory period of thirty days from service of the final assessments; (iii) the Tribunal must give effect to the provisions of Section 48(5) of Chapter 406 of the Laws of Malta, since the Applicant, without reasonable excuse, failed to submit to the Commissioner of Revenue the documentation pertinent to Alexandr Limited requested from him during the course of the Credit Control Exercise against the said Company; and, on the merits that - (iii) the grievances put forth by the Applicant are completely unfounded in fact and at law;

After having considered the documents marked Doc. “A” to Doc. “J” submitted by the Commissioner for Revenue together with his Reply, at folios 15 to 37 of the records of the proceedings;

After having considered that at this stage of the proceedings the issues being dealt with and determined by the Tribunal are the three preliminary pleas raised by the Commissioner for Revenue¹;

After having heard testimony by John Cassar², Martin Buttigieg³ and Clayton Tabone⁴, all of whom are representatives of the Commissioner for Revenue, given during the sitting held on the 2nd May 2017, testimony by Daniel Muscat, a representative of the Commissioner for Revenue, given during the sitting held on the 18th July 2017⁵, testimony by Jacqueline Grech during the sittings held on the 8th May 2018⁶ and 9th October 2018⁷ and after having considered the document submitted by her marked Doc. “JG1” at folio 75 of the records of the proceedings, after having heard testimony by Joe Cordina given during the sitting held on the 8th January 2019⁸, testimony by the Applicant given during the sittings held on the 12th March 2019⁹ and 5th November 2018¹⁰ and after having considered the documents submitted by him marked Doc. “BC1” and Doc. “BC2” at folios 85 to 94 of the records of the proceedings and his affidavit marked Doc. “X” at folio 105 of the records of the proceedings, and after having considered the affidavit by Joseph Cordina exhibited by the Applicant by means of a Note filed on the 16th May 2019 at folios 95 and 96 of the records of the proceedings;

After having considered the Note of Submissions by the Commissioner for Revenue at folios 108 to 117 of the records of the proceedings and the Reply by the Applicant at folios 122 to 130 of the records of the proceedings;

After having considered all the records of the proceedings;

Considers:

On the 6th July 2016 the Commissioner for Revenue issued a Demand Note against Alexandr Limited and the Applicant XXX, requesting the payment of outstanding tax as determined by the Commissioner¹¹. The Applicant felt aggrieved by the issue of the Demand Note and instituted these proceedings against the Commissioner requesting that the Tribunal declare the said Demand Note null and void on the grounds that: (i) the Demand Note has been erroneously issued against the company Alexandr Limited, which is in the process of being liquidated; (ii) the assessments, including the final assessments, issued by Commissioner for Value Added Tax have not been duly served on the Liquidator of the Company or on the Applicant as required by law, thus leading to the violation of the taxpayer’s rights since the assessments could not be duly contested;

¹ Folio 51 of the records of the proceedings and folio 61 of the records of the proceedings.

² Folio 54 and 55 of the records of the proceedings.

³ Folio 56 to 58 of the records of the proceedings.

⁴ Folio 59 and 60 of the records of the proceedings.

⁵ Folio 62 to 64 of the records of the proceedings.

⁶ Folio 72 and 73 of the records of the proceedings.

⁷ Folio 76 of the records of the proceedings.

⁸ Folio 81 to 83 of the records of the proceedings.

⁹ Folio 97 to 99 of the records of the proceedings.

¹⁰ Folio 106 of the records of the proceedings.

¹¹ Testimony given by Clayton Tabone, a representative of the Commissioner for Revenue, during the sitting held on the 2nd May 2017, folio 59 and 60 of the records of the proceedings.

and that (iii) the assessments and the Demand Note are exaggerated and do not reflect the actual business as carried out by the taxpayer.

The Commissioner for Revenue objects to the requests put forth by the Applicant, on the basis of the following pleas: preliminarily that - (i) the Administrative Review Tribunal is not the competent forum to determine and decide the grievances put forth by the Applicant with regards to the Demand Note dated 6th July 2016; (ii) the proceedings filed by the Applicant are null and void since they were not filed within the statutory period of thirty days from service of the final assessments; (iii) the Tribunal must give effect to the provisions of Section 48(5) of Chapter 406 of the Laws of Malta, since the Applicant, without reasonable excuse, failed to submit to the Commissioner of Revenue the documentation pertinent to Alexandr Limited requested from him during the course of the Credit Control Exercise against the said Company; and, on the merits that - (iii) the grievances put forth by the Applicant are completely unfounded in fact and at law.

At this stage of the proceedings the issues being dealt with and determined by the Tribunal are the three preliminary pleas raised by the Commissioner for Revenue¹².

From evidence submitted during the hearing of these proceedings the following facts result:

- By means of an application filed on the 29th August 2007¹³, the Applicant, as Director of the limited liability company Alexandr Limited, requested the registration of the said Company with the Department for Value Added Tax with the description of business activity as Real Estate Broker;
- The Company was registered with effect from the 1st August 2007 with the registration number MT18519715¹⁴;
- The original address given for the said company was Flat 6, Corner Court, Triq l-Imsell, St. Paul's Bay¹⁵. On the 14th August 2008, the Applicant requested a change of address to 3, Rose Court, Triq Annetto Caruana, St. Paul's Bay¹⁶;
- On the 21st April 2011, the Value Added Tax Department received a request from the Applicant for the de-registration of the VAT number of Alexandr Limited since it stopped operating¹⁷;
- By means of a Notice dated 15th June 2015¹⁸, addressed to Alexandr Limited at 3, Rose Court, Triq Annetto Caruana, St. Paul's Bay, the Commissioner for Revenue informed the company that *in terms of article 53 of the VAT Act 1998, you are required to submit your trade records and other documents to be inspected by officials of the Department. In this regard, you are kindly requested to produce the following records: Purchases Books from 01.06.2010 - 31.08.2010 and 01.09.2010 - 30.11.2010; Purchase Invoices and receipts for the same period; Audited Financial Statements for years ending 2009-2011. You are solicited to contact the undersigned at your earliest convenience, but not later than ten (10) days from receipt of this letter, on telephone number 227 99294 or email daniel.muscat @gov.mt;*

¹² Folio 51 of the records of the proceedings and folio 61 of the records of the proceedings.

¹³ Dok. "A" folio 15 to 16 of the records of the proceedings.

¹⁴ Folio 18 of the records of the proceedings.

¹⁵ Dok. "A" at folio 15 of the records of the proceedings.

¹⁶ Dok. "B" at folio 17 of the records of the proceedings.

¹⁷ Dok. "C" at folio 19 of the records of the proceedings.

¹⁸ Dok. "D" at folio 20 of the records of the proceedings.

- The Notice dated 15th June 2015 was delivered by hand by VAT Inspector Martin Buttigieg¹⁹;
- By means of a Notice dated 16th July 2015, addressed to Alexandr Limited at 3, Rose Court, Triq Annetto Caruana, St. Paul's Bay, the said company was once again informed that *in terms of article 53 of the VAT Act 1998, you are required to submit your trade records and other documents to be inspected by officials of the Department. In this regard, you are kindly requested to produce the following records: Purchases Books from 01.06.2010 - 31.08.2010 and 01.09.2010 - 30.11.2010; Purchase Invoices and receipts for the same period; Audited Financial Statements for years ending 2009-2011. You are solicited to contact the undersigned at your earliest convenience, but not later than ten (10) days from receipt of this letter, on telephone number 227 99294 or email daniel.muscat @gov.mt;*
- The second Notice dated 16th July 2015, was delivered by hand by Vat Inspector Chris Spiteri on the 20th July 2015²⁰;
- By means of a third Notice dated 4th August 2015²¹, also addressed to Alexandr Limited at 3, Rose Court, Triq Annetto Caruana, St. Paul's Bay, the company was once again informed that *in terms of article 53 of the VAT Act 1998, you are required to submit your trade records and other documents to be inspected by officials of the Department. In this regard, you are kindly requested to produce the following records: Purchases Books from 01.06.2010 - 31.08.2010 and 01.09.2010 - 30.11.2010; Purchase Invoices and receipts for the same period; Audited Financial Statements for years ending 2009-2011. You are solicited to contact the undersigned at your earliest convenience, but not later than ten (10) days from receipt of this letter, on telephone number 227 99294 or email daniel.muscat @gov.mt;*
- This notice was also delivered by hand by Vat Inspector Martin Buttigieg on the 6th August 2015²²;
- Alexandr Limited and/or XXX did not submit the documentation requested by the Commissioner for Revenue and Vat Inspector Daniel Muscat, who was entrusted with carrying out a Credit Control Exercise with regard to input tax claimed by Alexandr Limited during tax periods 01.06.2010-31.08.2010 and 01.09.2010-30.11.2010, recommended that: *a provisional assessment amounting to €3,701.24 shall be raised as per table below since the company failed to submit any purchases ledgers and invoices to sustain the input VAT claimed for the VAT period mentioned in the table below.*

<i>Vat Period</i>	<i>Amount €</i>	<i>Input Vat €</i>
<i>01.06.2010-31.08.2010</i>	<i>13,580.57</i>	<i>2,444.49</i>
<i>01.09.2010-30.11.2010</i>	<i>6,981.95</i>	<i>1,256.75</i>

- *The amount of input VAT being assessed represents 58% of the total input VAT claimed by the company since its first return²³;*

¹⁹ Credit Control Exercise Report, folio 27 of the records of the proceedings.

²⁰ Credit Control Exercise Report, folio 27 of the records of the proceedings and Advice of Receipt at folio 14 of the records of the proceedings.

²¹ Dok. "F" at folio 23 of the records of the proceedings.

²² Credit Control Exercise Report, folio 27 of the records of the proceedings.

²³ Dok. "G" at folio 25 to 28 of the records of the proceedings.

- On the 10th November 2015²⁴, provisional assessments for tax periods 01.06.2010-31.08.2010 and 01.09.2010-30.11.2010 were issued against Alexandr Limited for the total sum of €3,701.24 representing tax, and the further total sum of €740.25 representing administrative penalties;
- The provisional assessments were delivered by hand by Vat Inspectors John Cassar and Martin Buttigieg on the 16th November 2015, at 3, Rose Court, Triq Annetto Caruana, St. Paul's Bay. When nobody answered the door at the said premises they left the envelope containing the provisional assessments in the letterbox of the same²⁵;
- Following an internal note of the Department for Value Added Tax dated 23rd December 2015²⁶, which stated that Alexandr Limited did not request a Review from the provisional assessments issued on 10th November 2015, the Commissioner for Revenue, on the 27th January 2016, issued final assessments for tax periods 01.06.2010-31.08.2010 and 01.09.2010-30.11.2010 against Alexandr Limited requesting the payment of the total sum of €3,701.24 representing tax, together with the further total sums of €740.25 representing administrative penalties and of €1,511.71 representing interests, globally amounting to **€5,953.20**²⁷;
- The final assessments were delivered by hand by Vat Inspector Martin Buttigieg on the 1st March 2016 at 3, Rose Court, Triq Annetto Caruana, St. Paul's Bay, and once again when nobody answered the door at the said premises they left the envelope containing the final assessments in the letterbox of the same²⁸;
- On the 6th July 2016, the Commissioner for Revenue issued Demand Notes to Alexandr Limited and to XXX and addressed the same to "Black Coral" Triq Alofju Wignacourt, St. Paul's Bay, which was the address on XXX's I.D. Card at the time;
- Following receipt of the Demand Note dated 6th July 2016, XXX filed these proceedings on the 25th July 2016.

The first two preliminary pleas raised by the Commissioner for Revenue - the Tribunal is not competent to deal with and determine this case and the appeal lodged by the Applicant is null and void because it was not filed within the peremptory thirty day period set out in Section 2(1)(c) of the Ninth Schedule of Chapter 406 of the Laws of Malta:

In his Note of Submissions²⁹ the Commissioner for Revenue claims that *applicant had not notified defendant that the company was allegedly being liquidated, let alone with providing the latter with the liquidator's address and particulars. Appellant is trying to get out of a bad situation that he had brought upon himself when he filed the appeal fuori termine which is procedurally fatal to him. Our jurisprudence holds that such a period, i.e. the thirty day period in which an appeal from an assessment can be filed is a peremptory one and cannot be extended for any reason whatsoever. The Ninth Schedule which deals with appeals to the Administrative Review Tribunal in section 2(1)(c) is very explicit when it refers to the time limit for filing an appeal from an assessment before the Tribunal. It states that: 2.(1) An appeal against an assessment shall not be valid if: (a) omissis; (b) omissis; (c) it is not made within thirty days from*

²⁴ Folio 30 to 32 of the records of the proceedings.

²⁵ Vide testimony by John Cassar during the sitting held on the 2nd May 2017 at folio 54 and 55 of the records of the proceedings and testimony by Martin Buttigieg during the sitting held on the 2nd May 2017 at folio 56 to 58 of the records of the proceedings and Dok. "H" a folio 29 of the records of the proceedings.

²⁶ Dok. "I" at folio 33 of the records of the proceedings.

²⁷ Folio 36 and 37 of the records of the proceedings.

²⁸ Vide testimony by Martin Buttigieg during the sitting held on the 2nd May 2017 at folio 56 to 58 of the records.

²⁹ Folio 108 to 117 of the records of the proceedings.

the date of service of the notice against which the appeal is made. From that which has resulted supra (the facts as outlined by the Commissioner in his Note of Submissions), it is amply clear that the appeal in question was filed months after it should have been filed, so that in the humble opinion of defendant this preliminary plea should be sustained by this Honourable Tribunal. Reference is made to para. 3 of the appeal where appellant said that he began the process to liquidate the said company and that a liquidator had been appointed. He was carrying on as if defendant was aware of such facts! But this was not the case. What defendant knew was that the company had asked to be deregistered. One must not assume that once a company had asked to be deregistered it must necessarily be struck off! In fiscal law one does not have the luxury to assume anything. As the saying goes, res ipse loquitur. Defendant only knew that there was a demand that the company be deregistered and nothing more. Notwithstanding the clear duties the appellant had as director of the company he never informed defendant of any change of address except that once when the defendant was asked to change the company's address. Now appellant was alleging that his rights were being prejudiced. This allegation is unfounded at law and should be discarded by this Honourable Tribunal.

In his submissions the Commissioner for Revenue is completely silent with regard to the plea concerning the lack of competence of the Tribunal to determine and decide the grievances put forth by the Applicant. In spite of this, the Commissioner has not formally withdrawn the said plea and therefore the Tribunal will deal with and determine it together with the second plea concerning the nullity of the proceedings since, as pleaded by him, they have not been filed within the peremptory period of thirty days from the service of the assessments in terms of Section 2(1)(c) of the Ninth Schedule of Chapter 406 of the Laws of Malta.

As rightly pointed out by the Commissioner for Revenue, in terms of Section 2(1)(c) of the Ninth Schedule of Chapter 406 of the Laws of Malta, a taxpayer has a peremptory period of thirty days from **service of the final assessment/s** to lodge an appeal therefrom before the Administrative Review Tribunal. The key requirement here is the **effective, and not the merely apparent, service of the final assessment/s** to the taxpayer for the peremptory thirty day period to start running.

Section 73(2) of Chapter 406 of the Laws of Malta provides that: *any notice required to be given under this Act by the Commissioner or any other person may be served either personally or by being sent by post. Unless the contrary is proved service of a notice sent by post shall be proved by means of evidence that the notice was properly addressed and posted and shall be deemed to have been effected in the case of an address in Malta not later than the third day following the day when it was posted, and in the case of an address outside Malta the day succeeding that on which the notice would have been received in the ordinary course by post: Provided that, where such notice is not served on a person because that person could not be found or for other reasons attributable to that person and the Commissioner publishes a notice in the Gazette and in one or more daily newspapers stating that a notice has been made and inviting that person to call for it as and where directed by the Commissioner, then such notice shall also be deemed to have been duly notified on the date of such publication on a daily newspaper; (3)³⁰ For the purposes of subsection (2) of this section a notice shall be deemed to have been properly addressed if it has been addressed to a person's*

³⁰ As applicable during the period pertinent to these proceedings.

business or private address and an address furnished by a person to the Commissioner shall be deemed to be an address of that person unless and until a notice of a change of address is given by that person to the Commissioner.

From a reading of the above-quoted provision of the Law it clearly results that the Commissioner for Revenue can, at his own discretion, opt for one of two modes of service of notices sent to and/or assessments issued by him against the taxpayer: the personal mode of service or service by means of postal services. This observation of the Tribunal is confirmed by that observed by the Court of Appeal (Inferior Jurisdiction) in the judgement in the names **A.B. Co. Ltd. v. Commissioner for Value Added Tax, Appeal No. 8/06**, delivered on the 28th February 2007: *huwa deżumibbli minn qari attent ta' din id-disposizzjoni illi l-mira ġenerali intiza li tintlaħaq hi dik li l-avviż emess mill-Bord ġiġi notifikat lill-persuna, fiżika jew legali, li lilha għandu jkun notifikat. Isegwi minn dan illi l-liġi qed tippresupponi illi l-proċediment tan-notifika jirrealizza ruħu bil-konsenja ta' l-att ta' avviż. Biex jintlaħaq dan l-iskop l-artikolu in eżami jikkontempla żewġ modi ta' notifika: dik personali u dik bil-mezz postali. Huwa indikattiv, fuq l-interpretazzjoni tal-Qorti, illi l-liġi ma qegħda timponi ebda obbligu li l-mittenti għandu jikkonsegwi bilfors xi ġerarkija preferenzjali, u dan hu allura liberu li jadotta dak il-mezz li jidhirlu xieraq minn fost iż-żewġ modi speċifikati.*

In this particular case it clearly results that the Commissioner for Revenue opted for the **personal mode of service** of the final assessments issued against Alexandr Limited on the 26th January 2016, so much so that delivery of the same was entrusted to the Inspectors of the VAT Department and not to ordinary postal services by snail mail. This therefore means that the final assessments sought to be served on Alexandr Limited had to be **actually personally delivered to the taxpayer or its representative or to someone entrusted to and responsible for accepting correspondence from the Commissioner for Revenue on matters relating to the said company.** Anything short of this cannot be considered to be a valid service in terms of Law.

The fact that the personal mode of service requires **actual personal** service of the notice/assessments to the taxpayer or his representative clearly results from the first proviso of said Section 73(2) of Chapter 406 of the Laws of Malta, which provides: *Provided that, where such notice is not served on a person because that person could not be found or for other reasons attributable to that person and the Commissioner publishes a notice in the Gazette and in one or more daily newspapers stating that a notice has been made and inviting that person to call for it as and where directed by the Commissioner, then such notice shall also be deemed to have been duly notified on the date of such publication on a daily newspaper.*

When these provisions of the law are applied to the manner in which the final assessments issued against Alexandr Limited on the 26th January 2016 were delivered on the 1st March 2016, that is the Vat Inspectors merely posted the envelope containing the final assessments in the letterbox of the premises 3, Rose Court, Triq Annetto Caruana, St. Paul's Bay, when nobody presented himself at the door to accept service of the same, it clearly results that that delivery cannot be considered to be a valid service of the final assessments in terms of Law.

The fact that the Vat Inspectors went to deliver the final assessments at the last known address of the taxpayer as per the Department's records and actually posted the same in the letterbox of those premises, does not in any way ratify that service since the

correctness or otherwise of the delivery address is only marginal within the context of the personal mode of service opted for by the Commissioner for Revenue, where as already stated above, the central element is the actual and personal service to the taxpayer or his representative. Furthermore, this service was attempted four years after Alexandr Limited requested its de-registration from the Department and the latter was therefore in no position to assume that its records and the information contained therein, particularly mailing information, was still correct. In fact, the Applicant satisfactorily proved that the premises 3, Rose Court, Triq Annetto Caruana, St. Paul's Bay, was transferred by him unto a third party by means of a deed of transfer in the records of Notary Keith Ryan Calleja dated 19th September 2011³¹.

As the Commissioner for Revenue observed in his Note of Submissions *in fiscal law one does not have the luxury to assume anything*. This dictum applies to the Commissioner as much as it applies to the taxpayer!

This delay of four years between the request for de-registration and the initiation of a Credit Control Exercise for the purposes of that same de-registration request, should have led the Department and its Inspectors to be much more careful when executing the service of notices/assessments issued by the Commissioner for Revenue and to ensure that that service was effectively carried out in terms of law and not simply, and quite carelessly in the Tribunal's opinion, by putting the envelope containing the final assessments in the letterbox of the last known mailing address of the taxpayer.

The Commissioner for Revenue constantly emphasises the taxpayer's obligations towards the Department but the Tribunal firmly believes and is utterly convinced that the Commissioner himself has an absolute obligation to ensure that the taxpayer is always actually and effectively put in a position to act upon or contest any notices/assessment sent to or issued against him by the Commissioner, and not merely appear to be given such an opportunity. The Commissioner for Revenue cannot expect to be allowed to run roughshod over the taxpayer's rights on the basis of the very poor argument that in fiscal matters all obligations lie solely on the taxpayer. That is utterly and completely untrue and it is a 'belief' which is totally contrary to the spirit of the Law and of the principles of natural justice which regulate, control and harness any form of absolute and unfettered discretion and/or power which the Commissioner wrongfully believes he is granted by law.

The Tribunal would also like to add that the fact that the Commissioner for Revenue might not have been aware that Alexandr Limited was in the process of liquidation and was actually wound up and struck off from the Company Registry in June 2015, that is at the same time when the Credit Control Exercise against it was set to begin, and well before the final assessments were issued against it, also does not minimise the damning effect of the manner in which the final assessments were "delivered" to the said company. Once the service was not carried out in terms of law but was merely a very careless and negligent way of disposing of final assessments issued against the taxpayer, no form of excuse could ratify such a blatant and absolute short-coming. Here again the lapse of four years between the request for de-registration and the initiation of the Credit Control Exercise against the taxpayer and the eventual issue of final assessments against it, did not give the Commissioner any right to assume that Alexandr Limited was still registered with, at the time, the Company Registry. This is even more so in this particular case when

³¹ Doc. "BS2" at folio 86 to 94 of the records of the proceedings.

the de-registration was requested because Alexandr Limited stopped operations. Quite honestly, the Tribunal absolutely cannot understand why the Commissioner for Revenue and/or his representatives did not check the status of the company, something which can easily be done with the mere click of a button on one's device, before initiating any form of exercise and/or investigation in its regard, particularly when repeated services of notices and requests were proving to be totally futile. Unfortunately in this case, the Commissioner for Revenue abdicated his duties and simply chose the easy way out to the detriment of the taxpayer's and the Applicant's rights.

Incidentally, when the Commissioner for Revenue proceeded to the recovery phase of the tax requested from the taxpayer - a stage during which the contestation of the tax so requested is typically very difficult - he did verify the latest details and mailing address of the Applicant and sent the Demand Note to the address "Black Coral" Triq Alofju Wignacourt, San Pawl il-Baħar.

Once the service of the final assessments cannot be considered to have been a valid service in terms of Law, it follows that the peremptory thirty day period for the filing of an appeal from the said final assessments did not begin to run from the 1st March 2016, that is from the day when the envelope containing the assessments was merely posted in the letterbox of the premises 3, Rose Court, Triq Annetto Caruana, St. Paul's Bay. As a matter of fact, it did not begin to run at all. This means that the final assessments as issued by the Commissioner for Revenue cannot be considered to have become final and conclusive and therefore cannot be considered to be an executive title of the Commissioner for Revenue against the taxpayer within the meaning and for the purposes of Title VII of Part I of Book Second of Chapter 12 of the Laws of Malta. Consequently, the Commissioner for Revenue could not in this case validly proceed with the issuing of a Demand Note against Alexandr Limited and against the Applicant in terms of Section 59 of Chapter 406 of the Laws of Malta.

This observation by the Tribunal is further confirmed by that observed by the Court of Appeal in the judgement in the names **Victor Zammit v. Commissioner for Value Added Tax et, Civil Appeal No. 519/05** delivered on the 26th April 2013: *stima tat-taxxa dovuta maħruġa mill-Kummissarju ma hijiex l-aħħar kelma, u l-liġi stess tagħti jedd ta' appell minn dik l-istima quddiem il-Bord ta' l-Appelli dwar it-Taxxa fuq il-Valur Miżjud, taħt l-art. 43 tal-Kap.406, u jedd ieħor ta' appell fuq punt ta' liġi mid-deċiżjoni tal-bord quddiem din il-qorti taħt l-art. 47. Il-para, 4(d) tad-Disa' Skeda tal-Kap.406 jgħid illi appell quddiem il-bord isir "fi żmien tletin jum mid-data tan-notifika ta' l-avviż li kontrib isir l-appell" waqt illi l-art.47 tal-Kap.406 irid illi appell mid-deċiżjoni tal-bord quddiem din il-qorti isir "fi żmien tletin jum mid-data li fiha d-deċiżjoni appellata tiġi notifikata" lill-persuna li trid tappella. Sakemm ma jkunx inqata' l-appell, jew sakemm ma jkunx għadda ż-żmien għall-appell, kif sewwa jgħid il-Kummissarju stess fil-para. 3 tat-twegjiba tiegħu, "il-Kummissarju kien fl-impossibilità illi joħroġ demand notice".*

In the light of the above it results that once the final assessments issued by the Commissioner for Revenue are not final and conclusive, these can still be contested. Once the Applicant got to know about the tax dues being requested by the Commissioner for Revenue only following the issue of the Demand Note dated 6th July 2016, it follows that these proceedings, instituted on the 25th July 2016, have been duly filed within the peremptory period of thirty day set out in Section 2(1)(c) of the Ninth Schedule of Chapter 406 of the Laws of Malta.

In the light of the above, the first two preliminary pleas put forth by the Commissioner for Revenue are completely unjustified and must therefore be rejected by the Tribunal.

The Commissioner for Revenue puts forth a third preliminary plea, which please is based on Section 48(5) of Chapter 406 of the Laws of Malta.

Section 48(5) of Chapter 406 of the Laws of Malta provides that: *the Commissioner may, at any time within the period specified in subarticle (4), request any person to produce, or may remove from any person, including a third party, the records, documents, accounts and electronic data required to be kept by him in virtue of this article and to make copies thereof: Provided that, if there is evidence that after being requested by the Commissioner by means of a notice in writing, that such person failed to produce without any reasonable excuse any records, documents, accounts and electronic data within thirty days from the date of service of such notice, such person shall not be allowed to produce such records, documents, accounts and electronic data at a later stage after the issue of the provisional assessment or assessments or before the Tribunal or in any Court of law: Provided further that when reliance is placed on any other person to perform any task, the fact of that reliance or any delay or inaccuracy on the part of the person relied upon shall not constitute a reasonable excuse for the purposes of this sub-article.*

From a reading of this provision of the law, it clearly results that the Commissioner for Revenue is invoking the application of the first proviso of Section 48(5) of Chapter 406 of the Laws of Malta. The Commissioner is essentially requesting that the Tribunal prohibit the Applicant from submitting during the course of these proceedings, the documentation which was requested from Alexandr Limited during the Credit Control Exercise and which the latter and/or the Applicant failed to provide.

Prior to the application of the first proviso of Section 48(5) of Chapter 406 of the Laws of Malta however, the Tribunal must be satisfied that a number of requirements subsist and have been duly honoured. The said proviso in fact sets out the following requirements: (i) that the Commissioner for Revenue requests the documentation by means of a notice in writing; (ii) that the request is made within six years from the end of the year to which the requested documentation refers to; (iii) that the taxpayer is duly notified with the notice in writing; (iv) that the taxpayer fails to provide the requested documentation within thirty days from service of the notice in writing; and (v) that the taxpayer does not have a reasonable excuse for failing to provide the requested documentation. These requirements are cumulative and not alternative to each other. Therefore each and every one of them must subsist for the prohibition set out in the first proviso of Section 48(5) of Chapter 406 of the Laws of Malta to apply in any particular case.

As already observed further up in this judgement, by means of a notice in writing dated 15th June 2015³² the Commissioner for Revenue informed and request from Alexandr Limited: *in terms of article 53 of the VAT Act 1998, you are required to submit your trade records and other documents to be inspected by officials of the Department. In this regard, you are kindly requested to produce the following records: Purchases Books from 01.06.2010-31.08.2010 and 01.09.2010-30.11.2010; Purchase Invoices and*

³² Dok. "D" at folio 20 of the records of the proceedings.

receipts for the same period; Audited Financial Statements for years ending 2009-2001. You are solicited to contact the undersigned at your earliest convenience, but not later than ten (10) days from receipt of this letter, on telephone number 22799294 or e-mail: daniel.muscat@gov.mt. This notice was followed by two other identical notices respectively dated 16th July 2015³³ and 4th August 2015³⁴.

This shows that the Commissioner for Revenue did request documentation for the purposes of the Credit Control Exercise in writing and the request was made within six years from the end of the year to which the requested documentation refers to.

The Commissioner for Revenue further claims that the above-mentioned notices have been duly served on Alexandr Limited. In the Credit Control Exercise Report the VAT Inspector entrusted with the same observed that *no accounting records were made available as the company failed to submit any of the documents requested. A registered letter dated 22nd May 2015 addressed to the company returned unclaimed. Reds 14 and 15 refer. Subsequently three letters were sent to the company by hand whereby purchases books for selected VAT periods and financial statements for years 2009-2011 were requested, as follows:*

- *First Notice dated 15th June 2015 was delivered by hand by Martin Buttigieg, inspector on 30th June 2015. Red 16 and 17 refer.*
- *Second Notice dated 16th July 2015, delivered by hand by Chris Spiteri, inspector, on 20th July 2015. Red 18 and 19 refer.*
- *Third Notice dated 4th August 2015 was delivered also by hand by Martin Buttigieg, inspector, on 6th August 2015. Red 20 and 21 refer.*

From these observations it clearly results that for the purposes of these notices too, the Commissioner for Revenue opted for the personal mode of service. As already observed further above in this judgement this mode of service requires the **actual personal delivery** of the notices in the hands of the taxpayer and/or its representative, and therefore satisfactory proof of such actual and personal service of the notices. Even though the Commissioner for Revenue exhibited the Notices dated 15th June 2015, 16th July 2015 and 4th August 2015, he only exhibited the Advice of Receipt pertinent to the second notice, which Advice of Receipt is signed only by the VAT Inspectors and not also by a representative of Alexandr Limited³⁵. The Commissioner did not submit any proof regarding the service of the first and last notice sent to Alexandr Limited.

Once it is the Commissioner who raised the plea in terms of Section 48(5) of Chapter 406 of the Laws of Malta, it is up to the him to prove that the first four requirements necessary for the application of the first proviso of Section 48(5) of Chapter 406 of the Laws of Malta - that is (i) that the Commissioner for Revenue requests the documentation by means of a notice in writing; (ii) that the request is made within six years from the end of the year to which the requested documentation refers to; (iii) that the taxpayer is duly notified with the notice in writing; (iv) that the taxpayer fails to provide the requested documentation within thirty days from service of the notice in writing - actually subsist. Failure to prove the existence of at least one of these requirements will necessarily and invariably lead to the rejection of the plea based on this particular provision of the Law.

³³ Dok. "E" at folio 22 of the records of the proceedings.

³⁴ Dok. "F" at folio 23 of the records of the proceedings.

³⁵ Folio 24 of the records of the proceedings.

In the absence of satisfactory proof that Alexandr Limited or its representative have been duly and effectively served with the three notices issued by the Commissioner for Revenue on the 15th June 2015, 16th July 2015 and 4th August 2015, the Commissioner cannot successfully argue that without reasonable excuse they failed to submit the documentation requested in the said notices. Consequently neither can the Commissioner successfully argue that in this case and on the basis of these circumstances, the prohibition set out in the first proviso of Section 48(5) of Chapter 406 of the Laws of Malta must be applied against the Applicant.

In view of the above, the third preliminary plea based on Section 48(5) of Chapter 406 of the Laws of Malta too is unjustified and must therefore be rejected.

For all of the above-mentioned reasons the Tribunal is rejecting the three preliminary pleas raised by the Commissioner for Revenue and orders the continuation of the proceedings on the merits.

The Tribunal will determine costs in the judgement on the merits.

In terms of Section 2(4) of the Ninth Schedule of Chapter 406 of the Laws of Malta, the Tribunal orders that a copy of this preliminary judgement be served on the Applicant.

MAGISTRATE

DEPUTY REGISTRAR